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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

USA RECYCLING, INC., FRIENDLY CARTING, INC., JOSEPH CARIONE, ANGELO CARIONE, JEAN I. CARIONE, AND LOUIS CARIONE, and CARL R. FUCCI,

Petitioners,

VS.

THE TOWN OF BABYLON, THE TOWN BOARD OF THE TOWN OF BABYLON, RICHARD H. SCHAFFER, SUPERVISOR, FRANCINE V. BROWN, COUNCILWOMAN, PATRICK HAUGEN, COUNCILMAN, ROBERT KAUFOLD, COUNCILMAN, ANTHONY TAFURI, COUNCILMAN, and BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTOF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This instant matter is the companion case to that pending in No. 95-1223, *A.A. & M. Carting Service, Inc. et al. v. Town of Babylon et al.*, (hereinafter *A.A. & M.*) presently pending before this Court, which was decided contemporaneously with

the similar *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 64 U.S.L.W. 3551 (U.S. Feb. 20, 1996). This Court is respectfully referred to the briefs in opposition to *A.A. & M.*, as the cases arise from the same issue of the implementation of a commercial garbage district by the Town of Babylon in 1994.

Petitioners herein raise the same basic argument for why this Court should review the lower court's decision as did the Petitioner in *SSC Corp.* Additionally, Petitioners ask this Court to find that the court below ignored this Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994), as well as recent decisions of the Third and Eleventh Circuits. The decision of the court below, when read in conjunction with its decision in *SSC Corp.*[1], clearly displays appropriate deference by the court below to this Court's prior Commerce Clause jurisprudence, and provides no fertile grounds for the granting of certiorari.

WHY THE WRIT SHOULD BE DENIED

Contrary to Petitioners' contentions, the decision of the court below did not "ignore" the teachings of *Carbone*. Rather, the court below found that the Town of Babylon was simply utilizing traditional police powers, fully consistent with prior decisions of this Court.

Furthermore, the decision of the court below is not inconsistent with decisions of other Circuit courts. Rather, the facts before the court below were dramatically different from those addressed by courts in both the Third and Eleventh Circuits.

CARBONE WAS FOLLOWED, NOT IGNORED, BY THE COURT BELOW

Petitioners argue that the court below "virtually ignored" this Court's decision in *Carbone*. In reality, no fewer than

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[1] *See SSC Corp*, affirming the unconstitutionality of the Flow Control ordinance while reversing, on an analysis similar to the instant matter, the contract for Town residential waste.

five times did the court below address and reject Petitioners' arguments that *Carbone's* principles should be shoe-horned into the readily distinguishable facts of this case. The court below initially rejected Petitioners' attempt to place Babylon's system squarely within the *Carbone* framework.

> Babylon's waste management plan, ... neither discriminates against, nor imposes any incidental burdens on, interstate commerce. In reaching that conclusion, we reject the plaintiff's contention that the *Carbone* decision fashioned from the 'dormant' Commerce Clause a new, and unprecedentedly sweeping, limitation on local government authority to provide basic sanitation services to local residents and businesses, on an exclusive basis and financed by tax dollars.

USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1276 (2d Cir. 1995).

When the court below later analyzed whether or not Babylon's plan discriminated against interstate commerce, it stated "Babylon's waste management plan thus differs dramatically from the flow control ordinances struck down by the Supreme Court in *Carbone* and by this Court in *SSC Corp.*" *Id.* at 1283. The court below again discussed *Carbone* with respect to Petitioners' claim that Babylon forced the generators of waste to do business with the designated hauler. Petitioners argued that this "mirrors the situation in *Carbone*," but the court below dismissed the argument, stating "[w]e need not revisit our rejection of that argument." *Id.* at 1288.

In analyzing Babylon's ability to use economic incentives (a zero tipping fee), to benefit local businesses, the court below again stated that "[t]his is perfectly consistent with *Carbone*, as well." *Id.* at 1291. Lastly, and perhaps most significantly, the court below, in rejecting Petitioners' claim that Babylon's system had a discriminatory effect, or that it impermissibly burdened interstate commerce, stated that:

> To the contrary, we believe that the Town of Babylon has taken to heart the Supreme Court's admonition in *Carbone* that if 'special financing is necessary to ensure the long-term survival' of the incinerator, then 'the Town may subsidize the facility through general taxes or municipal bonds."

Id. at 1292.

Notwithstanding what Petitioners have asserted in the instant petition for a writ of certiorari, the court below did not disregard precedents of this Court. On the contrary, as demonstrated above, the court below fully analyzed the facts of the instant case, and found that the teachings of *Carbone* were followed by the Town of Babylon. Consequently, this Court need not review the decision of the court below.

THE THIRD AND ELEVENTH CIRCUITS

Petitioners attempt to demonstrate inconsistencies with other Circuit courts to support their request for review. However, in citing to *Waste Recycling v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F.Supp. 1566 (M.D. Ala. 1993), *aff'd*, 29 F.3d 641 (11th Cir. 1994)[2], Petitioners ignore the express consideration, and rejection of the market participation analysis of District Court Judge Thompson in *Waste Recycling*, by the Second Circuit in its companion decision. *See SSC Corp.*, 66 F.3d at 513, 516. In fact, a careful reading of *Waste Recycling* reveals that the Second Circuit may have been overgenerous in its characterization of the facts therein as similar to *SSC Corp.* There is no clear indication in the decision that the city of Geneva was actually collecting waste directly or by contract.

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[2] Petitioners inexplicably cite this decision in their brief as *Waste Recycling Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 29 F.3d 641 (11th Cir. 1994), *affirming*, 814 F.Supp. 1566 (M.D. Ala. 1993). Actually, the written decision, and thus the language and logic cited in the brief, was that of the District Court and not the Court of Appeals.

Even less similar to *Waste Recycling* is the instant case, where the court below first made a threshold determination that the Town, as a market regulator, could form the District and therefore collect and dispose of the Town's own waste. Only then did the court below look at the specific components of the District, and correctly found that the Town was acting as a market participant with **its own** solid waste. *USA Recycling*, 66 F.3d at 1289. *Accord White v. Massachusetts Council of Construction Employees*, 460 U.S. 204 (1983) (Boston's *own* employees); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (South Dakota's **own** concrete); *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976) (Maryland's **own** abandoned cars); *Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245, 250 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990) (county's **own** landfill).

Petitioners next seek to characterize the decision of the court below as inconsistent with the Third Circuit's decision in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995). Notwithstanding the readily apparent factual distinctions, Petitioners argue that the Third Circuit's rejection of the public utility model argument is somehow applicable herein. The District at bar is not, and has never been claimed to be a utility, it is **actual** responsibility, and liability[3], by the Town, for the collection and disposal of the Town's commercial solid waste. The use of an agent, BSSCI, does not alter the scheme so as to place this case within the parameters of the New Jersey model.

Furthermore, the Third Circuit held in *Atlantic Coast* that New Jersey's comprehensive solid waste management scheme violated the Commerce Clause because the designation process employed by the State did not provide a "level playing field" to those both in-state and out of state. *Atlantic Coast*,

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[3] *See SSC Corp.*, 66 F.3d at 516, for an insightful discussion of the significance of CERCLA liability which attaches to the Town as a result of the formation of the District, and which is an additional compelling reason for upholding a municipality's formation of a District.

48 F.3d at 715. Petitioners' attempt to assert the argument that a level playing field did not exist with respect to Babylon's selection of BSSCI was rejected by the court below, when it stated that "[d]espite the plaintiffs' protestations to the contrary, none of these factors detracted from the nondiscriminatory nature of the Town's bidding process, or resulted in any undue burdens on interstate commerce."[4] *USA Recycling*, 66 F.3d at 1290. The instant Petitioners did have the option, and, in fact, did participate in the bidding process, by attending pre-bid conferences and receiving a bid package, although Petitioners decided not to ultimately bid on the project.

This Court should not review Babylon's nondiscriminatory decision to select BSSCI for collection of waste within the District. No purpose would be served by this Court granting the instant writ of certiorari, as there is no split of Circuit authority as portrayed by Petitioners.

MIS-CHARACTERIZATION OF THE PROCESSING ASPECT

Petitioners, in a desperate attempt to convince this Court to review the lower court decision, misstate both the level of solid waste to be collected by BSSCI that is "recyclable rich", and what will ultimately happen to this waste once collected by BSSCI. Other than a bald assertion, however, Petitioners offer no support for their statement that approximately 60% of the mixed commercial waste was separated for resale by U.S.A. Recycling.[5]

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[4] BSSCI was selected pursuant to a vigorous national bid, through a Request for Proposal process as prescribed in New York law. *See* General Municipal Law § 120-w (McKinney's 1986).

[5] In fact, the instant Petitioners have yet to find a consistent percentage to assert is "recyclable rich." At the District Court, Petitioners submitted affidavits which stated that they have been able to recycle upwards of 80% of the commercial solid waste at its facility. Now, however, that level is only at 60%.

Most significant about Petitioners assertion as to how much waste is "recyclable rich" is the erroneously conclusion drawn by Petitioners that this waste will simply be incinerated rather than processed. Pet. Brief at 7. As the record before the court below indicates, BSSCI fully intends to contract with a processing facility or facilities to separate any recyclable waste collected. It would be contrary to sound business and industry practice to simply bring the waste directly to a disposal site without first separating such waste.

IRREPARABLE HARM

Petitioners urge review by this Court on the issue of whether irreparable harm should be found upon **any** claim of a constitutional deprivation. The fact that this issue was not dispositive to the case at bar should be sufficient to deny certiorari on this issue alone.

However, it is respectfully submitted that the lower courts, particularly the District Court judges who actually hear testimony, are deciding this issue in a relatively consistent manner, and the present state of the law should not be disturbed. In this instant case, then Chief Judge Platt, of the Eastern District of New York, after hearing counsel for both sides on multiple occasions, reasonably found that the case before him was solely about money, with no other grounds to support a finding of irreparable harm. The court below found that the record below supported the District Court's finding that "[Petitioners] alleged injuries would be entirely financial—and therefore remediable by an award of money damages." *USA Recycling*, 66 F.3d at 1295.

CONCLUSION

By the foregoing, the writ of certiorari should be denied.

Respectfully submitted,

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